



Report of the Adjudicator

Complaint number	43849
Cited WASPA members	SMS Portal (Pty) Ltd (0139)
Notifiable WASPA members	n/a
Source of the complaint	Public
Complaint short description	Unsubscribe request.
Date complaint lodged	23 June 2020
Date of alleged breach	Not known.
Applicable version of the Code	16.9
Clauses of the Code cited	3.6, 3.7, 4.6, 4.7, 4.9 (b), 4.9 (c), 4.9 (k), 5.4, 5.5, 17.1 and 24.43.
Related complaints considered	n/a
Fines imposed	R15 000.00 payable within 7 (seven) days.
Other sanctions	Identify the customers involved in the member's facilities being used by MBD and Comit, to suspend such customer's pending their satisfaction that such customers have ensured that their services may not be used in contravention of the Code.
Is this report notable?	Not notable.

Summary of notability	n/a
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Initial complaint

The complainant complained of being sent a message soliciting payment from him in an aggressive manner from a company called MBD in respect of a service he had never subscribed to with a company called Comit Technologies t/a On-Air TV with whom he had no dealings. He was also sent a letter.

Member's response

1. The member is an aggregator and has no relationship with MBD.
2. It is not clear how the complainant identified the member nor why WASPA directed the complaint to the member.
3. The complainant had the option of unsubscribing to the SMS or blocking the number.
4. With regards to clause 4.9 (b) (c) and (k):
 - a. The member provides a transmission facility for bulk SMSs. By their very nature, bulk SMSs are not personal or P2P (person to person). As explained in more detail below, they are typically of a standard format sent by a corporate to their customer base, conveying specific and limited information.
 - b. The complainant is not SMS Portal's customer, nor have they been given his details by any person.
 - c. The message content (of any SMS sent by a third party) is not known to SMS Portal. It does not store the recipient's details on its system, nor can it access any information about the recipients of SMSs generated on its system – the intended recipients' details are provided to it in a file format for transmission.
 - d. The Constitution provides that every person shall have the right to privacy in section 14: Everyone has the right to privacy, which includes the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) the privacy of their communications infringed." The member has not done any of these things.
 - e. The member cannot be seen to have been invading anyone's privacy.
 - f. The demand was not lawful.
 - g. Blaming the member for the message is like blaming the Post Office for the content of a letter.
 - h. MBD and Comit are required by law to comply with the law.
 - i. The member has no relationship with MBD and Comit and as such cannot be held liable for their behavior. Therefore, the member did not facilitate or encourage unlawful behavior.

- j. The complaint refers to clause 5.4. As no charge was levied against the member the first part is irrelevant and as the member has no relationship with MBD or Comit or the complainant the first part of the clause does not apply.
- k. Clause 5.5. which is also relied on, is similarly not applicable since the member did not knowingly “disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”.
 - i. If the complainant has a relationship with MBD or Comit Technologies, the member was not aware of it; but if it is true that money is owed, then the message would not be false or deceptive or likely to mislead. The member does not know if this is true one way or another.
- l. Bulk SMS is not suited to sending specific messages to identified recipients.
- m. The member does have arrangements with certain clients to send bulk SMSs on their behalf, and those clients are advised of the requirements of the Code, particularly in relation to processing of personal information, privacy and direct marketing. There is nothing about the message complained about that suggests that it is a form of direct marketing.
- n. To the extent that the member may have provided the transport for the message received by the complainant, it would be peculiar for a customer to send this form of SMS because this SMS appears to deal with a specific debt by an individual. SMS Portal sends bulk SMSs on a commercial basis.
- o. Clause 16.12 of the Code requires that “Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease”:
 - i. The SMS received by the complainant contains contact details and the identity of the sender and the entities on whose behalf the message was sent (and the letter also received by him contains further details of the parties i.e. MBD and Comit Technologies).
 - ii. The message was clearly not generated by the member.
- p. The member denies that it has contravened the Code in any respect at all. Accordingly, the sanctions set out in section 24.43 of the Code are not appropriate or proportionate or equitable.
- q. The member raised the following points in mitigation:
 - i. The member does not send letters to anyone, and this complaint appears to rely in part on a letter received by the complainant.
 - ii. The member has no way of knowing if the complainant has any commercial relationship with Comit Technologies or any debt owing to them.
 - iii. The member does not send bespoke messages to individuals, it is a bulk SMS aggregator and sends multiple messages at the same time which all have the same content, to the database it is provided with (which it does not own or retain).

- iv. The member has no relationship with the complainant and has no record of his details on its system. It has not disclosed these details to anyone or used them for the purposes of sending unsolicited messages.
 - v. The member has indicated in the very few prior complaints that have been made against it for contraventions by its direct customers, it has a good record of compliance with the Code and of ensuring compliance by its own customers. It takes steps to ensure that unsolicited messages are not sent through its systems by strictly enforcing the provisions of the Code against its own customers.
 - vi. There are options available to the complainant including to contact those companies about the message or block the sender, rather than seeking to blame the member for a contravention of the Code.
 - vii. To the extent that an information provider using the member's system has been involved in this issue, the member (i) requires all of its customers to comply with the Code as it applies to them; (ii) regularly audits its customers; and (ii) requires its customers to review all of their arrangements with third parties. The member has not, itself, been the subject of any complaint in relation to a breach of the Code.
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Complainant's response

No further response.

Member's further response

No further response.

Sections of the Code considered

3.6 Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

4.6 Members must not knowingly host, transmit, publish or link to illegal content.

4.9 Members must not provide any services or promotional material that:

(b) results in any unreasonable invasion of privacy;

(c) induces an unacceptable sense of fear or anxiety;

(k) facilitates or encourages unlawful behavior.

5.4 Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

17.1 With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.

24.43. Sanctions that may be imposed on a member found to be in breach of the Code of Conduct include one or more of the following:

(a) a requirement for the member to remedy the breach (including ordering a refund);

(b) a formal reprimand;

(c) an appropriate fine on the member, to be collected by WASPA;

(d) suspension of the member from WASPA for a defined period;

(e) expulsion of the member from WASPA;

(f) a requirement for the member to disclose the identity of any customer found to be acting in breach of this Code of Conduct;

(g) a requirement for the member to suspend or terminate the services of any customer that provides a service in contravention of this Code of Conduct;

(h) a requirement to withhold a specified amount or portion of money payable by the member to the customer.

Decision

The member raises many points which can be summarised as follows:

1. The member has no relationship with either the complainant, MBD or Comit and as such cannot be held responsible for their actions.
2. The member is merely a conduit for the sending of bulk SMSs.
3. The complainant had other remedies at hand including opting out from the messages and blocking the SMS.

Before I continue with my decision I confirm and agree with the member that the letter sent to the complainant has no place in this complaint and as such my decision will be limited to the SMS sent. In addition, WASPA identified the member due to their long code being used.

In dealing with the general issues raised by the member, and before I proceed to deal with each clause of the Code raised, I am of the opinion that:

1. The mere conduit argument is invalid being drawn from the principles of the Electronic Communications and Transactions Act (ECT Act). Unlike ISPA, WASPA has not applied for recognition under the ECT Act and as such the application thereof is not relevant to the WASPA Code.
2. The fact that the complainant had other remedies does not mean he could not exercise his remedies in terms of the Code of Conduct. The Code does not require a complainant to first exhaust all other remedies. In addition, the fact that he could opt out or block the SMS does not mean that the Code could still not have been breached.
3. Clauses 3.6 and 3.7 specifically envisage a scenario where there is not necessarily a contractual nexus between all parties in a complaint.

3.6 Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.

- The member has not demonstrated that they have ensured this as they claim to have no awareness of a relationship with the message originator even though their long code was used. I find a breach of 3.6.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

- The member's statements on what steps they take will be taken into consideration.

4.6 Members must not knowingly host, transmit, publish or link to illegal content.

- I find no breach.

4.9 Members must not provide any services or promotional material that:

(b) results in any unreasonable invasion of privacy; - I find no breach.

(c) induces an unacceptable sense of fear or anxiety; - I find no breach as the member did not provide the services or promotional material.

(k) facilitates or encourages unlawful behavior. – I find a breach. The member provided services that facilitated the unlawful behavior.

5.4 Members must have honest and fair dealings with their customers.

- I find no breach.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

- I find no breach as the member had no knowledge of the content of the SMS.

17.1 With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.

- I find no breach.

24.43. Sanctions that may be imposed on a member found to be in breach of the Code of Conduct include one or more of the following:

(a) a requirement for the member to remedy the breach (including ordering a refund);

(b) a formal reprimand;

(c) an appropriate fine on the member, to be collected by WASPA;

(d) suspension of the member from WASPA for a defined period;

(e) expulsion of the member from WASPA;

(f) a requirement for the member to disclose the identity of any customer found to be acting in breach of this Code of Conduct;

(g) a requirement for the member to suspend or terminate the services of any customer that provides a service in contravention of this Code of Conduct;

(h) a requirement to withhold a specified amount or portion of money payable by the member to the customer.

Sanctions

I agree that the member cannot be held to have breached most of the provisions raised in the complaint. However, the fact that the member does not appear to know that their long code was being used by MBD and Comit to send SMS's of this nature is concerning. Accordingly for the breach of 3.6 and 4.9 (k) I order the member to identify the customers involved in their facilities being used by MBD and Comit, to suspend such customer's pending their satisfaction that such customers have ensured that their services are not used in contravention of the Code. In addition, I fine the member R15 000.00 payable within 7 (seven) days of receipt or publication of this report (whichever is the sooner).

Matters referred back to WASPA

N/A
